

**(B) Establishment of rates, terms, and conditions.**

- (i) CTUs involved in interconnection negotiations shall ensure that all reasonable negotiation opportunities are completed prior to the termination of the first commercial call. The date upon which the first commercial call between CTUs is terminated signifies the beginning of a nine-month period in which each CTU shall reciprocally terminate the other CTU's traffic at no charge, in the absence of mutually negotiated interconnection rates. Reciprocal interconnection rates, terms, and conditions shall be established pursuant to the compulsory arbitration process in subsection (g) of this section. In establishing these initial rates and within the time period of three years from termination of the first commercial call, no cost studies shall be required from a new CTU.
  - (ii) An ILEC may adopt the tariffed interconnection rates approved for a larger ILEC or interconnection rates of a larger ILEC resulting from negotiations without providing the commission any additional cost justification for the adopted rates. If an ILEC adopts the tariffed interconnection rates approved for a larger ILEC, it shall file tariffs referencing the appropriate larger ILEC's rates. If an ILEC adopts the interconnection rates of a larger ILEC, the new CTU may adopt those rates as its own rates by filing tariffs referencing the appropriate larger ILEC's rates. If an ILEC chooses to file its own interconnection tariff, the new CTU must also file its own interconnection tariff.
- (C) Public disclosure of interconnection rates, terms, and conditions.** Interconnection rates, terms, and/or conditions shall be made publicly available as provided in subsection (h) of this section.

**(c) Minimum Interconnection Arrangements.**

- (1) Pursuant to mutual agreements, interconnecting CTUs shall provide each other non-discriminatory access to ancillary services such as repair services, E-911, operator services, white pages telephone directory listing, publication and distribution, and directory assistance. The following minimum terms and conditions shall apply:
  - (A) **Repair Services.** For purposes of this section, a CTU shall be required to provide repair services for its own facilities regardless of whether such facilities are used by the CTU for retail purposes, or provided by the CTU for resale purposes, or whether the facilities are ordered by another CTU for purposes of collocation.
  - (B) **E-911 services.** E-911 services include Automatic Number Identification (ANI), ANI and Automatic Location Identification (ALI), ANI and /or ALI and selective routing, and/or any other combination of enhanced 9-1-1 features required by the Regional Planning Commission or the 9-1-1 emergency communication district responsible for the geographic area involved. This requirement is in accordance with Health and Safety Code, Chapter 771, and the applicable regional plan approved by the Advisory Commission on State Emergency Communications or by the emergency communication district, defined in Health and Safety Code, Chapter 771, §771.001(2), responsible for the geographic area involved or other local authority responsible for the geographic area involved.
- (i) As a prerequisite to providing local exchange telephone service to any customer and thereafter, a CTU must meet the following requirements:
  - (I) The CTU is responsible for ordering or provisioning the trunk groups necessary to provide E-911 services.
  - (II) The CTU is responsible for enabling all its customers to dial the three digits 9, 1, 1, and only these numbers, to access 9-1-1 service.
  - (III) The CTU is responsible for providing the telephone number of the 9-1-1 calling customer to the appropriate CTU's E-911 tandems or appropriate 9-1-1 Public Safety Answering Point, as applicable. This number must include both the numbering plan area (NPA) code, or numbering plan digit (NPD), as appropriate and necessary, and the local telephone number of the 9-1-1 calling

customer, that can be used to successfully complete a return call to the customer. ANI represents this capability.

- (IV) The CTU is responsible for selectively routing a 9-1-1 customer call, as well as interconnecting traffic on its network, to the appropriate CTU's E-911 tandems or appropriate 9-1-1 Public Safety Answering Point, as applicable, based on the ANI and/or location of the calling party. The appropriate CTU and/or appropriate 9-1-1 entity, as applicable, shall provide routing information to the CTU for routing purposes.
  - (V) The CTU is responsible for providing appropriate information describing the location from which a CTU customer is placing a 9-1-1 call. This information shall consist of the calling customer name, physical location, appropriate emergency service providers, and other similar data. For purposes of this subclause, appropriate or other similar data shall be determined by the Regional Planning Commission responsible for the geographic area involved, in accordance with Health and Safety Code, Chapter 771, and the applicable regional plan approved by the Advisory Commission on State Emergency Communications or by the emergency communication district, defined in Health and Safety Code, Chapter 771, §771.001(2), responsible for the geographic area involved or other local authority responsible for the geographic area involved.
- (ii) Each interconnecting CTU is responsible for providing to the local authority and the appropriate CTU, accurate and timely current information for all published, nonpublished, and nonlisted information associated with its customers for the purposes of emergency or E-911 services.
- (I) For purposes of this clause, the appropriate CTU refers to the CTU designated by the local authority for purposes of maintaining the 9-1-1 database.
  - (II) For purposes of this clause, the information is considered timely if within 24 hours of receipt of the information, it is delivered by the CTU to the appropriate CTU and the local authority, and/or placed into the database by the appropriate CTU.
  - (III) For purposes of this clause, the information sent by a CTU to the appropriate CTU or the information used by the appropriate CTU shall be maintained in a fashion to ensure that it is accurate at a percentage as close to 100% as possible. "Accurate" means a record that correctly routes a 9-1-1 call, and/or provides correct location information relating to the origination of such call. "Percentage" means the total number of accurate records in that database divided by the total number of records in that database. In determining the accuracy of records, a CTU shall not be held responsible for erroneous information provided to it by a customer or another CTU.
  - (IV) Interconnecting CTUs shall execute confidentiality agreements with each other, as necessary, to prevent the unauthorized disclosure of non-published/non-listed numbers. Interconnecting CTU shall be allowed access to the ALI database by the appropriate CTU for verification purposes. The local 9-1-1 entity shall provide non-discriminatory access to the Master Street Address Guide.
- (iii) Each CTU is responsible for developing a 9-1-1 disaster recovery, service restoration plan with input from the applicable Regional Planning Commission or emergency communication district and the Advisory Commission on State Emergency Communications. This plan shall identify the actions to be taken in the event of a network based 9-1-1 service failure. The goal of such actions shall be the efficient and timely restoration of the 9-1-1 service. CTUs shall notify the applicable Regional Planning Commission or emergency communications district of any changes in CTU network based services and other services that may require changes to the plan.

- (iv) Interconnecting CTUs shall provide each other and the appropriate 9-1-1 entity notification of scheduled outages for 9-1-1 trunks at least 48 hours prior to such outages. In the event of unscheduled outages for 9-1-1 trunks, interconnecting CTUs shall provide each other and the appropriate 9-1-1 entity immediate notification of such outages.
- (v) Each NCTU's rates for 9-1-1 service to a Public Safety Answering Point shall be presumed to be reasonable if they do not exceed the rates charged by the ILEC for similar service.
- (C) **Operator Services.** Interconnecting CTUs shall negotiate to ensure the interoperability of operator services between networks, including but not limited to the ability of operators on each network to perform such operator functions as reverse billing, line verification, call screening, and call interrupt.
- (D) **White Pages Telephone Directory and Directory Assistance.** Interconnecting CTUs shall negotiate to ensure provision of white pages telephone directory and directory assistance services.
  - (i) The telephone numbers and other appropriate information of the customers of NCTUs shall be included on a non-discriminatory basis in the DCTU's white pages directory associated with the geographic area covered by the white pages telephone directory published by the DCTUs. Similarly, any white pages telephone directory provided by an NCTU to its customers shall have corresponding DCTU listings available on a non-discriminatory basis. The entries of NCTU customers in the DCTU white pages telephone directory shall be interspersed alphabetically among the entries of the DCTU customers and shall be no different in style, size, or format than the entries of the DCTU customers, unless requested otherwise by the NCTU. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall not directly charge the customer of another CTU located in the geographic areas covered by the white pages telephone directory for white pages listings or directory.
  - (ii) Listings of all customers located within the local calling area of an NCTU, but not located within the local calling area of the DCTU publishing the white pages telephone directory, shall be included in a separate section of the DCTU's white pages telephone directory at the option of the NCTU.
  - (iii) CTUs shall provide directory listings and related updates to the CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU or to any CTU providing directory assistance, in a timely manner to ensure inclusion in the annual white page listings and provision of directory assistance service that complies with §23.61 of this title. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall be responsible for providing all other CTUs with timely information regarding deadlines associated with its published white pages telephone directory.
  - (iv) CTUs shall, upon request, provide accurate and current subscriber listings (name, address, telephone number) and updates in a readily usable format and in a timely manner, on a non-discriminatory basis, to publishers of yellow pages telephone directory. Listings of subscribers desiring non-listed status shall not be provided by CTUs for publication purposes.
  - (v) White pages telephone directory shall be distributed to all customers located within the geographic area covered by the white pages telephone directory on non-discriminatory terms and conditions by the CTU or its affiliate publishing the white pages telephone directory.
  - (vi) A CTU or its affiliate that publishes a white pages telephone directory on behalf of the CTU shall provide other CTUs non-discriminatory access to a single page per CTU, in alphabetical order, in the information section of the white pages telephone directory to permit critical customer contact information regarding emergency services, billing and

service information, repair services and other pertinent information. Additional access to the information section of the white pages telephone directory shall be subject to negotiations.

- (vii) CTUs must provide information that identifies customers desiring non-listed and/or non-published telephone numbers and/or non-published addresses to the CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU and to the CTU maintaining the directory assistance database. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall not divulge such non-listed and/or non-published telephone numbers or addresses and the CTU maintaining the directory assistance database shall not divulge such non-published telephone numbers or addresses.
  - (viii) CTUs shall provide each other non-discriminatory access to directory assistance databases.
- (2) At a minimum, interconnecting CTUs shall negotiate to ensure the following:
- (A) Non-discriminatory access to databases such as 800 and Line Information Data Base (LIDB) where technically feasible, to ensure interoperability between networks and the efficient, timely provision of service to customers;
  - (B) non-discriminatory access to Telecommunications Relay Service;
  - (C) Common Channel Signaling interconnection including transmission of privacy indicator where technically available;
  - (D) non-discriminatory access to all signaling protocols and all elements of signaling protocols used in routing local and interexchange traffic, including signaling protocols used to query call processing databases, where technically feasible;
  - (E) number portability and the inclusion of the NCTU's NXX code(s) in the Local Exchange Routing Guide and related systems;
  - (F) non-discriminatory handling, including billing, of mass announcement/audiotext calls including, but not limited to, 900 and 976 calls;
  - (G) provision of intercept services for a specific telephone number in the event a customer discontinues service with one CTU, initiates service with another CTU, and the customer's telephone number changes;
  - (H) cooperative engineering, operations, maintenance and billing practices and procedures; and
  - (I) non-discriminatory access to Advanced Intelligent Network (AIN), where technically available.

**(f) Negotiations.**

- (1) CTUs and other negotiating parties shall engage in good-faith negotiations and cooperative planning as necessary to achieve mutually agreeable interconnection arrangements.
- (2) Before terminating its first commercial telephone call, each CTU requesting interconnection shall negotiate with each CTU or other negotiating party that is necessary to complete all telephone calls, including local service calls and EAS or ELCS calls, made by or placed to the customers of the requesting CTU. Upon request, DCTUs within major metropolitan calling areas will contact other CTUs and arrange meetings, within 15 days of such request, in an effort to facilitate negotiations and provide a forum for discussions of network efficiencies and inter-company billing arrangements.
- (3) Unless the negotiating parties establish a mutually agreeable date, negotiations are deemed to begin on the date when the CTU or other negotiating party from which interconnection is being requested receives the request for interconnection from the CTU seeking interconnection. The request shall:
  - (A) be in writing and hand-delivered; sent by certified mail or by facsimile;
  - (B) identify the initial specific issues to be resolved, the specific underlying facts, and the requesting CTU's proposed resolution of each issue;
  - (C) provide any other material necessary to support the request, included as appendices; and
  - (D) provide the identity of the person authorized to negotiate for the requesting CTU.

- (4) The requesting CTU may identify additional issues for negotiation without causing an alteration of the date on which negotiations are deemed to begin.
  - (5) The CTU or negotiating party from which interconnection is sought shall respond to the interconnection request no later than 14 working days from the date the request is received. The response shall:
    - (A) be in writing and hand-delivered; sent by certified mail or by facsimile;
    - (B) respond specifically to the requesting party's proposed resolution of each initial issue identified by the requesting party, identify the specific underlying facts upon which the response is based and, if the response is not in agreement with the requesting party's proposed resolution of each issue, the responding party's proposed resolution of each issue;
    - (C) provide any other material necessary to support the response, included as appendices; and
    - (D) provide the identity of the person authorized to negotiate for the responding party.
  - (6) At any point during the negotiations required under this subsection, any CTU or negotiating party may request the commission designee(s) to participate in the negotiations and to mediate any differences arising in the course of the negotiation.
  - (7) Interconnecting CTUs may, by written agreement, accelerate the requirements of this subsection with respect to a particular interconnection agreement except that the requirements of subsection (g)(1)(A) of this subsection shall not be accelerated.
  - (8) The requirements of this subsection shall apply upon the effective date of this section. A CTU that received a request for interconnection before the effective date of this section but did not respond to it may respond no later than 14 working days after the effective date of this section.
  - (9) If a requesting CTU initiated negotiations for interconnection before the effective date of this section, negotiations shall be deemed to have begun on the first date for which there is written evidence supporting a CTU's request for interconnection.
- (g) **Compulsory arbitration process.**
- (1) A negotiating CTU that is unable to reach mutually agreeable terms, rates, and/or conditions for interconnection with any CTU or negotiating party may petition the commission to arbitrate any unresolved issues. In order to initiate the arbitration procedure, a negotiating CTU:
    - (A) shall file its petition with the commission during the period from the 135th to the 160th day (inclusive) after the date on which its request for negotiation under subsection (f) of this section was received by the other CTU involved in the negotiation;
    - (B) shall provide the identity of each CTU and/or negotiating party with which agreement cannot be reached but whose cooperation is necessary to complete all telephone calls made by or placed to the customers of the requesting CTU;
    - (C) shall provide all relevant documentation concerning the unresolved issues;
    - (D) shall provide all relevant documentation concerning the position of each of the negotiating parties with respect to those issues;
    - (E) shall provide all relevant documentation concerning any other issue discussed and resolved by the negotiating parties; and
    - (F) shall send a copy of the petition and any documentation to the CTU or negotiating party with which agreement cannot be reached, not later than the day on which the commission receives the petition.
  - (2) A non-petitioning party to a negotiation under subsection (f) of this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the commission receives the petition.
  - (3) If a requesting CTU initiated negotiations for interconnection before the effective date of this section, provides written evidence supporting its request for interconnection as required under subsection (f)(9) of this section and demonstrates that negotiations have taken place for at least 135 days, the date on which a CTU involved in such negotiations petitions the commission for arbitration shall be deemed to be the 135th day from the start of negotiations.

- (4) The compulsory arbitration process shall be completed not later than nine months after the date on which a CTU receives a request for interconnection under subsection (f) of this section.
- (h) **Filing of rates, terms, and conditions.**
- (1) Rates, terms and conditions resulting from negotiations, compulsory arbitration process, and statements of generally available terms.
- (A) A CTU from which interconnection is requested shall file any agreement, adopted by negotiation or by compulsory arbitration, with the secretary of the commission. The commission shall make such agreement available for public inspection and copying within ten days after the agreement is approved by the commission pursuant to subparagraphs (C) and (D) of this paragraph.
- (B) An ILEC serving greater than five million access lines may prepare and file with the secretary of the commission, a statement of terms and conditions that it generally offers within the state pursuant to 47 United States Code §252(f) (1996). The commission shall make such statement available for public inspection and copying within ten days after the statement is approved by the commission pursuant to subparagraph (E) of this paragraph.
- (C) The commission shall reject an agreement (or any portion thereof) adopted by negotiation if it finds that
- (i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.
- (D) The commission shall reject an agreement (or any portion thereof) adopted by compulsory arbitration, under subsection (g) of this section, pursuant to guidelines found in 47 United States Code §252(e)(2)(B) (1996).
- (E) The commission shall review the statement of generally available terms filed under subparagraph (B) of this paragraph, pursuant to guidelines found in 47 United States Code §252 (f) (1996). The submission or approval of a statement under this paragraph shall not relieve an ILEC serving greater than five million access lines of its duty to negotiate the terms and conditions of an agreement pursuant to §47 United States Code §251 (1996).
- (2) **Rates, terms and/or conditions among DCTUs.** Within 15 days of a request from a CTU negotiating interconnection arrangements with a DCTU, a non-redacted version of any agreement reflecting the rates, terms, and conditions between and/or among DCTUs which relate to interconnection arrangements for similar traffic shall be disclosed to the CTU, subject to commission-approved non-disclosure or protective agreement. A non-redacted version of the same agreement shall be disclosed to commission staff at the same time if requested, subject to commission-approved non-disclosure or protective agreement.
- (i) **Customer safeguards.**
- (1) **Requirements for provision of service to customers.** Nothing in this section or in the CTU's tariffs shall be interpreted as precluding a customer of any CTU from purchasing local exchange service from more than one CTU at a time. No CTU shall connect, disconnect, or move any wiring or circuits on the customer's side of the demarcation point without the customer's express authorization as specified in this paragraph. A CTU shall provide local exchange service to a customer who is receiving local exchange service from another CTU only under the following conditions:
- (A) **Carrier-initiated carrier change orders.** Before a CTU order generated from outbound telemarketing is processed, the CTU initiating the change must obtain authorization, as specified in 47 Code of Federal Regulations Part 64, Subpart K, §64.1100. The authorization shall be produced if the local exchange service customer challenges the change. An authorization form will be accepted as valid if it meets any one of the following forms.

- (i) It is a written authorization from the customer in a form that meets the requirements of subparagraph (C) of this paragraph; or
  - (ii) it is an electronic authorization placed from the telephone number(s) which is (are) the subject of the change order(s); or
  - (iii) it is an oral authorization obtained by an appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative; or
  - (iv) it is verified by the following procedure.
    - (I) Within three business days of the customer's request for a CTU change, the soliciting local carrier sent the new customer an information package via first class mail containing at least the information concerning the requested change as specified in 47 Code of Federal Regulations Part 64, Subpart K, §64.1100(d); and
    - (II) Within 14 days after mailing said package, the customer has not canceled the change order.
- (B) **Customer-initiated carrier change orders.** The CTU receiving the customer-initiated request for change of carrier shall keep an internal memorandum or other record generated at or near the time of the request. Such internal record is to be maintained by the carrier, at a minimum, for 12 months to serve as verification of the customer's authorization to change carriers, which will be made available to the customer and/or to the commission upon request.
- (C) **Letters of Agency (LOA).** If a CTU obtains written authorization from a customer for a change of carrier as specified in paragraph (1)(A) of this subsection, it shall use a letter of agency (LOA) as specified in this subparagraph.
- (i) The LOA shall be a separate document whose sole purpose is to authorize the CTU to initiate a carrier change. The LOA must be signed and dated by the customer of the telephone line(s) requesting the carrier change.
  - (ii) The LOA shall not be combined with inducements of any kind on the same document.
  - (iii) Notwithstanding clauses (i) and(ii) of this subparagraph, the LOA may be combined with checks that contain only the required LOA language prescribed in clause (iv) of this subparagraph and the necessary information to make the check a negotiable instrument. The LOA shall not contain any promotional language or material but shall contain, on the front of the check and on the back of the check near the signature line, a clearly legible notice that the customer is authorizing a carrier change by signing the check.
  - (iv) At a minimum, the LOA must be printed in a clearly legible form and must contain clear and unambiguous language that confirms:
    - (I) the customer's billing name and address and each telephone number to be covered by the carrier change order; and
    - (II) that the customer designates the prospective CTU to act as the customer's agent for the carrier change; and
    - (III) the decision to change the local exchange carrier from the current CTU to the prospective CTU; and
    - (IV) the customer may incur a reconnection charge with the current CTU, if the customer wishes to return to receiving local exchange service from the current CTU; and
    - (V) that the customer understands that the local calling scope obtained from the prospective CTU may differ from the local calling scope offered by the current CTU, resulting in differing rates and charges, including toll charges, if the local calling scope offered by the prospective CTU is more limited than the local calling scope offered by the current CTU; and
    - (VI) the customer may incur a charge for changing carriers.

- (v) The LOA shall not suggest or require that customer take some action in order to retain the customer's current CTU.
- (vi) If any portion of a LOA is translated into another language, then all portions of the LOA must be translated into that language.
- (D) **Commission audits.** The commission is authorized to conduct periodic audits of the CTU's records reflecting the authorization received from its customers.
- (E) **Liability for charges.** Any prospective CTU that violates the verification procedures described in subparagraph (A) of this paragraph and that collects charges for local exchange telephone service shall be liable to the current CTU in an amount equal to all charges paid by such customer after such violation, in accordance with such procedures as the Federal Communications Commission may prescribe.
- (2) **Requirements for CTUs ceasing operations.** In the event that a CTU ceases its operations, it is the responsibility of the CTU to notify the commission and all of the CTU's customers at least 61 working days in advance that their service will be terminated. The notification shall include a listing of all alternative service providers available to customers in the exchange and shall specify the date on which service will be terminated.
- (3) **Requirements for service installations.** DCTUs that interconnect with NCTUs shall be responsible for meeting the installation of service requirements under §23.61(e)(2) of this title in providing service to the NCTU. NCTUs shall make a good-faith effort to meet the requirements for installation in §23.61(e)(2) of this title, and may negotiate with the DCTU to establish a procedure to meet this goal.
  - (A) For those customers for whom the NCTU provides dial tone but not the local loop, 95% of the NCTU's service orders shall be completed in no more than ten working days from request for service, unless a later date is agreed to by the customer.
  - (B) For those customers for whom the NCTU does not provide dial tone and resells the telephone services of a DCTU, 95% of the NCTU's service orders shall be completed in no more than seven working days from request for service, unless a later date is agreed to by the customer.
  - (C) For those customers where the NCTU uses facilities other than a DCTUs' resale facilities obtained through PURA 95 §3.453 (a)-(c), the NCTU shall complete service orders within 30 calendar days from request of service, unless a later date is agreed to by the customer or the customer is located outside of the NCTU's applicable build-out area as defined in PURA §3.2531.
  - (D) Additionally, the DCTU shall not discriminate between its customers and NCTUs if the DCTU is able to install service in less than the time permitted under §23.61(e)(2) of this title.



**Attachment II**

**Public Utility Regulatory Act of 1995**  
**Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (Vernon Supp. 1996)**  
**Sections 3.251, 3.252, 3.2531, 3.2532, 3.358, 3.453, 3.454**

**Sec. 3.251. CERTIFICATE REQUIRED.**

- (a) A public utility may not in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.
- (b) Except as otherwise provided in this subtitle, a public utility may not furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another public utility, without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located. [Sec. 50]
- (c) A person may not provide local exchange telephone service, basic local telecommunications service, or switched access service without a certificate of convenience and necessity, a certificate of operating authority, or a service provider certificate of operating authority.
- (d) A municipality may not receive a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority under this Act. In addition, a municipality or municipal electric system may not offer for sale to the public, either directly or indirectly through a telecommunications provider, a service for which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.

**Sec. 3.252. EXCEPTIONS.**

- (a) A telecommunications utility is not required to secure a certificate of public convenience and necessity, certificate of operating authority, or service provider certificate of operating authority for:
  - (1) an extension into territory contiguous to that already served by it and not receiving similar service from another telecommunications utility and not within the certificated area of another telecommunications utility;
  - (2) an extension within or to territory already served by it or to be served by it under a certificate of public convenience and necessity, certificate of operating authority, or service provider certificate of operating authority;
  - (3) operation, extension, or service in progress on September 1, 1975; or
  - (4) interexchange telecommunications service, non-switched private line service, shared tenant service, specialized communications common carrier service, commercial mobile service, or operator service as defined by Section 3.052(a) of this Act.

- (b) Any extensions allowed by Subsection (a) of this section shall be limited to devices for interconnection of existing facilities or devices used solely for transmitting telecommunications utility services from existing facilities to customers of retail utility service. [Sec. 51]

**Sec. 3.2531. CERTIFICATE OF OPERATING AUTHORITY.**

- (a) In lieu of applying for a certificate of convenience and necessity, an applicant may apply for a certificate of operating authority.
- (b) An application for a certificate of operating authority shall specify whether the applicant is seeking a facilities based certificate of operating authority under this section or a service provider certificate of operating authority under Section 3.2532. When an application for a certificate of operating authority or service provider certificate of operating authority is filed, the commission shall give notice of the application to interested parties and, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person interested in the application may intervene at the hearing.
- (c) If seeking a facilities based certificate of operating authority, the applicant must include in the application a proposed build-out plan demonstrating how the applicant will deploy its facilities throughout the geographic area of its certificated service area over a six-year period. The commission may issue rules for a holder of a certificate of operating authority with respect to the time within which the holder must be able to serve customers, except that a holder must serve customers within a build-out area within 30 days of the date of a customer request for service. The commission may not require a holder to place "drop" facilities on every customer's premises or to activate fiber optic facilities in advance of customer request as part of the build-out requirements. The plan required by this subsection must meet the following conditions:
  - (1) 10 percent of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the first year;
  - (2) 50 percent of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the third year; and
  - (3) all of the area to be served must be served with facilities other than the facilities of the incumbent local exchange company by the end of the sixth year.
- (d) The build-out plan may permit not more than 40 percent of the applicant's service area to be served by resale of the incumbent local exchange company's facilities under the tariff required to be approved in Section 3.453 of this Act, except that during the six years immediately following the grant, a holder of a certificate of operating authority may extend its service by resale only within the area it is obligated to serve under the build-out plan approved by the commission and to the distant premises of one of its multi-premises customers beyond that build-out area but within its certificated service area. The 40-percent resale limitation applies to incumbent local exchange facilities resold by a

holder of a certificate of operating authority as part of the provision of local exchange telephone service, regardless of whether the facilities are purchased directly by the certificate of operating authority holder from the incumbent local exchange company or purchased by an intermediary carrier from the incumbent local exchange company and then provided to the certificate of operating authority holder for resale. In no event may an applicant use commercial mobile service to meet the build-out requirement imposed by this section, but an applicant may use PCS or other wireless technology licensed or allocated by the Federal Communications Commission after January 1, 1995, to meet the build-out requirement.

- (e) A certificate of operating authority shall be granted within 60 days after the date of the application on a nondiscriminatory basis after consideration by the commission of factors such as the technical and financial qualifications of the applicant and the applicant's ability to meet the commission's quality of service requirements. The commission may extend the 60-day period on good cause shown. In an exchange of an incumbent local exchange company serving fewer than 31,000 access lines, the commission shall also consider:
  - (1) the effect of granting the certificate on any public utility already serving the area and on the utility's customers;
  - (2) the existing utility's ability to provide adequate service at reasonable rates;
  - (3) the impact of the existing utility's ability as the provider of last resort; and
  - (4) the ability of the exchange, not the company, to support more than one provider of service.
- (f) In addition to the factors prescribed by Subsection (e) of this section, the commission shall consider the adequacy of the applicant's build-out plan in determining whether to grant the application. The commission may administratively and temporarily waive compliance with the six-year build-out plan on a showing of good cause. The holder of a certificate shall file periodic reports with the commission demonstrating compliance with the plan approved by the commission, including the requirement that not more than 40 percent of the service area of a new certificate may be served by resale of the facilities of the incumbent local exchange company.
- (g) An application for a certificate of operating authority may be granted only for an area or areas that are contiguous and reasonably compact and cover an area of at least 27 square miles, except that:
  - (1) in an exchange in a county having a population of less than 500,000 that is served by an incumbent local exchange company having more than 31,000 access lines, an area covering less than 27 square miles may be approved if the area is contiguous and reasonably compact and has at least 20,000 access lines; and
  - (2) in an exchange of a company serving fewer than 31,000 access lines in this state, an application may be granted only for an area that has boundaries similar to the

**boundaries of the serving central office served by the incumbent local exchange company holding the certificate of convenience and necessity for that area.**

- (h) The commission may not, before September 1, 1998, grant a certificate of operating authority in an exchange of an incumbent local exchange company serving fewer than 31,000 access lines. The commission shall require that the applicant meet the other appropriate certification provisions of this Act.**
- (i) Six years after an application for a certificate of operating authority has been granted for a particular area or areas or when the new applicant has completed its build-out plan required by this section, the commission may waive the build-out requirements of this section for additional applicants. In addition, in service areas served by an incumbent local exchange company having more than one million access lines which, as of September 1, 1995, is subject to any prohibition under federal law on the provision of interLATA service, the build-out requirements of this section shall be eliminated in any service area where all prohibitions on that company's provision of interLATA services are removed such that the company can offer interLATA service together with its local and intraLATA toll service.**
- (j) (1) On an application filed after September 1, 1997, the commission may conduct a hearing to determine:**
  - (A) if the build-out requirements of Subsections (c), (d), and (g) of this section have created barriers to the entry of facilities based local exchange telephone service competition in exchanges in counties with a population of more than 500,000 served by companies having more than 31,000 access lines; and**
  - (B) the effect of the resale provisions on the development of competition except in certificated areas of companies serving fewer than 31,000 access lines as provided by Section 3.2532(d)(1) of this Act.**
- (2) In making the determination under Subdivision (1) of this subsection, the commission shall consider:**
  - (A) the policy of this Act to encourage construction of local exchange networks;**
  - (B) the number and type of competitors that have sought to provide local exchange competition under the existing rules prescribed by this Act; and**
  - (C) whether, if new build-out and resale rules were adopted, innovative and competitive local exchange telephone services are more likely to be provided.**
- (3) If the commission determines that the existing build-out requirements have created barriers to facilities based local exchange competition in exchanges described by Subdivision (1)(A) of this subsection, the requirements of Subsections (c), (d), and (g) of this section and of Section 3.2532 may be changed**

if the changes will encourage additional facilities based competition. However, in no event may exchange sizes be reduced below 12 square miles, or the permitted resale percentage of Subsection (d) of this section be increased to more than 50 percent. If new rules are adopted, the rules may apply only to applicants for certificates filed after the date of adoption of those rules.

- (k) If the holder of a certificate of authority fails to comply with any requirement imposed by this Act, the commission may:
  - (1) revoke the certificate; or
  - (2) impose administrative penalties or take other action under Subtitle I, Title I, of this Act.

**Sec. 3.2532. SERVICE PROVIDER CERTIFICATE OF OPERATING AUTHORITY.**

- (a) To encourage innovative, competitive, and entrepreneurial businesses to provide telecommunications services, the commission may grant service provider certificates of operating authority. An applicant must demonstrate that it has the financial and technical ability to provide its services and show that the services will meet the requirements of this section.
- (b) A company is eligible to obtain a service provider certificate of operating authority under this section unless the company, together with affiliates, had in excess of six percent of the total intrastate switched access minutes of use as measured by the most recent 12-month period preceding the filing of the application for which data is available. The commission shall obtain from the incumbent local exchange telephone companies and from the applicant such information as is necessary to determine eligibility and shall certify such eligibility within 10 days of the filing of the application. A service provider certificate of operating authority shall be granted within 60 days after the date of the application on a nondiscriminatory basis after consideration by the commission of factors such as the technical and financial qualifications of the applicant and the applicant's ability to meet the commission's quality of service requirements. The commission may extend the 60-day period on good cause shown.
- (c) An applicant for a service provider certificate of operating authority shall file with its application a description of the services it will provide and show the areas in which it will provide those services.
- (d) A service provider certificate of operating authority holder:
  - (1) may obtain services under the resale tariffs ordered by the commission as specified by Section 3.453 of this Act, except in certificated areas of companies serving fewer than 31,000 access lines;
  - (2) may obtain for resale the monthly recurring flat rate local exchange telephone service and associated nonrecurring charges, including any mandatory extended

area service, of an incumbent local exchange company at a five percent discount to the tariffed rate, and:

- (A) the incumbent local exchange company shall also sell any feature service that may be provided to customers in conjunction with local exchange service, including toll restriction, call control options, tone dialing, custom calling services, and caller ID at a five percent discount to the tariffed rate, including any associated nonrecurring charge for those services, provided that the incumbent local exchange company shall make available to a holder of a service provider certificate of operating authority at an additional five percent discount any discounts made available to the customers of the incumbent local exchange company who are similarly situated to the customers of the holder of the service provider certificate of operating authority;
  - (B) service providers and incumbent local exchange companies may agree to rates lower than the tariffed rates or discounted rates;
  - (C) the five percent discounts provided by this subdivision do not apply in exchanges of companies having fewer than 31,000 access lines in this state;
  - (D) if the tariffed rates for the services being resold change, the changed rate is applicable to the resold service, but the commission may not, for holders of service provider certificates of operating authority, create a special class for purposes of resold services, and the discount provided to holders of service provider certificates of operating authority shall remain at five percent of the tariffed rate or discounted rate; and
  - (E) the holder of a service provider certificate of operating authority may purchase for resale optional extended area service and expanded local calling service but those services may not be discounted;
- (3) may sell the flat rate local exchange telephone service only to the same class of customers to which the incumbent local exchange company sells that service;
  - (4) may not use a resold flat rate local exchange telephone service to avoid the rates, terms, and conditions of an incumbent local exchange company's tariffs;
  - (5) may not terminate both flat rate local exchange telephone service and services obtained under the resale tariff approved as prescribed by Sections 3.453(a)-(c) of this Act on the same end user customer's premises;
  - (6) may not use resold flat rate local exchange telephone services to provide access services to other interexchange carriers, cellular carriers, competitive access providers, or other retail telecommunications providers, but may permit customers to use resold local exchange telephone services to access interexchange carriers, cellular carriers, competitive access providers, or other retail telecommunications providers;

- (7) may obtain services offered by or negotiated with a holder of a certificate of convenience and necessity or certificate of operating authority; and
  - (8) may obtain for resale single or multiple line flat rate intraLATA calling service when provided by the local exchange company at the tariffed rate for online digital communications.
- (e) The holder of a certificate of operating authority or certificate of convenience and necessity shall not be granted a service provider certificate of operating authority as to the same territory. A holder of a service provider certificate of operating authority who applies for either a certificate of operating authority or a certificate of convenience and necessity as to the same territory must include a plan to relinquish its service provider certificate of operating authority.
- (f) An incumbent local exchange company that sells flat rate local exchange telephone service to a holder of a service provider certificate of operating authority may retain all access service and "1+" intraLATA toll service originated over the resold flat rate local exchange telephone service.
- (g) An incumbent local exchange company may not:
- (1) delay provisioning or maintenance of services provided under this section;
  - (2) degrade the quality of access provided to another provider;
  - (3) impair the speed, quality, or efficiency of lines used by another provider;
  - (4) fail to fully disclose in a timely manner after a request for the disclosure all available information necessary for the holder of the service provider certificate of operating authority to provision resale services; or
  - (5) refuse to take any reasonable action to allow efficient access by a holder of a service provider certificate of operating authority to ordering, billing, or repair management systems of the local exchange company.
- (h) In this section:
- (1) "Affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with a company that applies for a service provider certificate of operating authority under this section.
  - (2) "Control" means to exercise substantial influence over the policies and actions of another.

**Sec. 3.358. INFRASTRUCTURE.**

- (a) It is the goal of this State to facilitate and promote the deployment of an advanced telecommunications infrastructure in order to spur economic development throughout



**Texas. Texas should be among the leaders in achieving this objective. The primary means of achieving this goal shall be through encouraging private investment in the state's telecommunications infrastructure by creating incentives for such investment and promoting the development of competition. The best way to bring the benefits of an advanced telecommunications network infrastructure to Texas communities is through innovation and competition among all the state's communications providers. Competition will provide Texans a choice of telecommunications providers and will drive technology deployment, innovation, service quality, and cost-based prices as competing firms seek to satisfy customer needs.**

**(b) In implementing this section, the commission shall consider the following policy goals of this State:**

- (1) ensure the availability of the widest possible range of competitive choices in the provision of telecommunications services and facilities;**
- (2) foster competition and rely on market forces where competition exists to determine the price, terms, availability, and conditions of service in markets in which competition exists;**
- (3) ensure the universal availability of basic local telecommunications services at reasonable rates;**
- (4) encourage the continued development and deployment of advanced, reliable capabilities and services in telecommunications networks;**
- (5) assure interconnection and interoperability, based on uniform technical standards, among telecommunications carriers;**
- (6) eliminate existing unnecessary administrative procedures which impose regulatory barriers to competition and assure that competitive entry is fostered on an economically rational basis;**
- (7) assure consumer protection and protection against anticompetitive conduct;**
- (8) regulate providers of services only to the extent they have market power to control the price of services to customers;**
- (9) encourage cost-based pricing of telecommunications services so that consumers pay a fair price for services that they use; and**
- (10) subject to Section 3.353 of this Act, develop quality of service standards for local exchange companies as it deems appropriate to place Texas among the leaders in deployment of an advanced telecommunications infrastructure except that the 10 percent limitation specified in Section 3.353 of this Act shall not include the requirements of Subsections (c)(1)-(4) of this section.**

- (c) Recognizing that it will take time for competition to develop in the local exchange market, the commission shall act, in the absence of competition, to ensure that the following infrastructure goals are achieved by electing companies:
- (1) Electing incumbent local exchange companies shall make access to end-to-end digital connectivity available to all customers in their territories by December 31, 1996.
  - (2) Fifty percent of the local exchange access lines in each electing local exchange company's territory must be served by a digital central office switch by January 1, 2000.
  - (3) All electing company new central office switches installed in Texas must be digital, or technologically equal to or superior to digital, after September 1, 1995. At a minimum, each new central office switch installed after September 1, 1997, must be capable of providing Integrated Services Digital Network (ISDN) services in a manner consistent with generally accepted national standards.
  - (4) Electing incumbent local exchange companies' public switched network backbone inter-office facilities must employ broadband facilities capable of at least 45 megabits per second, or at lower bandwidths if evolving technology permits the delivery of video signal at quality levels comparable to a television broadcast signal, by January 1, 2000. This requirement shall not extend to local loop facilities.
- (d) (1) An electing company of greater than five million access lines shall also install Common Channel Signaling 7 capability in all central offices by January 1, 2000.
- (2) An electing company of greater than five million access lines shall connect all of its serving central offices to their respective LATA tandem central offices with optical fiber or equivalent facilities by January 1, 2000.
- (3) An electing company serving more than one million access lines and fewer than five million access lines shall provide digital switching central offices in all exchanges by December 31, 1998.
- (e) The commission may consider waivers of Subsections (c)(1)-(4) of this section for electing local exchange companies serving fewer than one million lines, if the local exchange company demonstrates that such investment is not viable economically, after due consideration is given to the public benefits which would result from compliance with such requirements; and, in addition, may consider a temporary extension of any period with respect to Subsections (c)(1)-(4) of this section for electing local exchange companies serving fewer than two million but more than one million lines, if the local exchange company demonstrates that such extension is in the public interest.
- (f) The commission may not consider the cost of implementing Subsection (c) or (d) of this section in determining whether an electing company is entitled to a rate increase under this subtitle or increased universal service funds under Section 3.608 of this Act.

**Sec. 3.453. RESALE.**

- (a) An incumbent local exchange company serving one million or more access lines or electing the incentive regulation plan under Subtitle H of this title shall file a usage sensitive loop resale tariff by September 1, 1995. An incumbent local exchange company serving fewer than one million access lines or not electing under Subtitle H of this title shall file a resale tariff within 60 days of the date on which a certificate of operating authority or service provider certificate of operating authority is granted under Subtitle F of this title.
- (b) "Loop" resale as used in this section means the purchase of the local distribution channel or "loop" facility from the incumbent local exchange company for the purpose of resale to end user customers.
- (c) The commission shall conduct any proceeding it determines appropriate to determine the rates, terms, and conditions for this tariff within 180 days of filing. The commission may:
  - (1) only approve a usage sensitive rate that recovers the total long run incremental cost of the loop on an unseparated basis, plus an appropriate contribution to joint and common costs; and
  - (2) only permit a holder of a certificate of convenience or necessity, certificate of operating authority, or service provider certificate of operating authority to purchase from the resale tariff, except as provided by Subsection (f)(1) or (f)(2) of this section.
- (d) On September 1, 1995, a provider of telecommunications service may not impose any restriction on the resale or sharing of any service for which it is not a dominant provider nor, as to any incumbent local exchange company electing alternative regulation under Subtitle H of this title, for any service entitled to regulatory treatment under Basket III as described by Section 3.356 of this Act.
- (e) A holder of a certificate of operating authority or service provider certificate of operating authority has the reciprocal obligation to permit local exchange companies to resell its existing loop facilities at its regularly published rates if the local exchange company has no loop facilities and has a request for service.
- (f) (1) The commission shall eliminate all resale prohibitions in an electing incumbent local exchange company's tariffs on:
  - (A) completion of the commission's costing and pricing rulemaking;
  - (B) completion of rate rebalancing of the incumbent local exchange company rates required by Section 3.457 of this Act; and
  - (C) removal of all prohibitions on incumbent local exchange companies providing interLATA service.

- (2) The commission shall eliminate all resale prohibitions in the tariffs of an electing company of one million access lines or more on removal of all prohibitions on such company's provision of interLATA service.
- (3) When the commission eliminates the resale prohibitions under this subsection, it shall continue to prohibit the resale of local exchange or directory assistance flat rate services as a substitute for usage sensitive services. If the commission finds that the rate for a particular service or function will, as a result of the costing and pricing proceeding, be less than the cost of providing the service or function and that the difference in rate and cost will not be recovered from the universal service fund, the service may be offered for resale only to the same class of customer as sold to by the incumbent local exchange company. In any event, after resale prohibitions are removed, residence service may not be resold to business customers.
- (g) Nothing herein alters resale or sharing arrangements presently permitted in incumbent local exchange company tariffs existing on September 1, 1995, or tariffs proposed by an incumbent local exchange company serving more than five million access lines in this state that are filed on or before May 1, 1995.

**Sec. 3.454. IMPUTATION.**

- (a) Not later than December 1, 1996, the commission shall adopt rules governing imputation of the price of a service.
- (b) Imputation is a regulatory policy the commission shall apply to prevent an incumbent local exchange company from selling a service or function to another telecommunications utility at a price that is higher than the rate the incumbent local exchange company implicitly includes in services it provides to its retail customers.
- (c) The commission may require imputation only of the price of a service that is:
  - (1) not generally available from a source other than the incumbent local exchange company; and
  - (2) necessary for the competitor to provide its competing services.
- (d) The commission may not require imputation of the price to a local exchange telephone service while the price is capped under Subtitle H or I of this title.
- (e) The price of switched access service shall be imputed to the price of each service for which switched access service is a component until switched access service is competitively available.
- (f) The commission may not require imputation on a rate-element-by-element basis but only on a service-by-service basis.

- (g) For a service provided under a customer specific contract for which imputation may be required under Subsection (c) of this section, the commission may not require imputation on a rate-element-by-element basis but only on a service-by-service basis within the contract.
- (h) The incumbent local exchange company shall demonstrate that the price it charges for its retail service recovers the costs of providing the service. For purposes of this subsection, the costs of providing the service is defined as the sum of:

  - (1) specifically tariffed premium rates for the noncompetitive services or service functions, or elements of these noncompetitive services or service functions (or their functional equivalent) that are used to provide the service;
  - (2) the total service long run incremental costs of the competitive services or service functions that are used;
  - (3) any costs, not otherwise reflected in Subdivision (1) or (2) of this subsection, that are specifically associated with the provision of the service or group of services; and
  - (4) any cost or surcharge associated with an explicit subsidy that is applied to all providers of the service for the purpose of promoting universal service.
- (i) The commission may waive an imputation requirement for any public interest service such as 9-1-1 service and dual party relay service if the commission determines that the waiver is in the public interest.

**Attachment III**

**Order Addressing Certified Issues**

**PUC Docket No. 14658**

**Application Of Southwestern Bell Telephone Company, GTE Southwest, Inc.  
And Contel Of Texas, Inc. For Approval Of Flat-Rated Local Exchange Resale  
Tariffs Pursuant To PURA 1995 § 3.2532**

OPD

**PUC DOCKET NO. 14658**  
**SOAH DOCKET NO. 473-95-1209**

**APPLICATION OF SOUTHWESTERN BELL §  
TELEPHONE COMPANY, GTE §  
SOUTHWEST, INC. AND CONTEL OF §  
TEXAS, INC. FOR APPROVAL OF §  
FLAT-RATED LOCAL EXCHANGE §  
RESALE TARIFFS PURSUANT TO §  
PURA 1995 § 3.2532 §**

**PUBLIC UTILITY COMMISSION**

**RECEIVED**

APR 10 1996

**OF TEXAS**

OFFICE OF  
POLICY DEVELOPMENT

**ORDER ADDRESSING CERTIFIED ISSUES**

This Order addresses certified issues involving (1) whether the Public Utility Commission of Texas (Commission) has the authority to determine if the recently enacted federal Telecommunications Act of 1996<sup>1</sup> (the Act) has preempted PURA95<sup>2</sup> §3.2532 and other provisions in the state statute related to the approval of a flat-rated resale service tariff, and (2) if such authority exists, whether the Act has preempted or otherwise impacted any such state statutory provision. The Commission concludes that (1) PURA95 §1.404 gives the Commission the authority to determine if a federal statute preempts its controlling statute; (2) the Act provides only for the express preemption of state law, rather than any implied preemption of such; (3) the Act does not expressly preempt the provisions in PURA95 relevant to the approval of a flat-rated resale service rates under PURA §3.2532 because those rates are not the only rates that may be used; (4) the Act impacts the inclusion of "resale prohibitions" in the tariffs of an electing company of one million access lines or more upon the removal of all prohibitions on such local exchange carrier's provision of intraLATA service, as contemplated by PURA95 §3.453(f)(2).

**I. Procedural History**

On February 27, 1996, the State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) issued an order certifying several issues to the Commission, pursuant to P.U.C.

---

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §§151 *et seq.*).

<sup>2</sup> Public Utility Regulatory Act of 1995, Tex. Rev. Civ. Stat. Ann. art. 1446c-0 (Vernon Supp. 1996).

PROC. R. 22.127. Briefs and reply briefs in response to these certified issues were filed by Southwestern Bell Telephone Company (SWB), GTE Southwest, Inc. (GTE-SW), the Texas Association of Long Distance Telephone Companies (TEXALTEL), AT&T Communications of the Southwest, Inc. (AT&T), MCI Telecommunications Corporation (MCI), Time Warner Communications, Teleport Communications Group, the State of Texas, the Office of Public Utility Counsel (OPC), and the General Counsel. Given the timing of the issuance of the ALJ's order and the Commission's open meeting schedule, the Commission finds--pursuant to P.U.C. PROC. R. 22.5(b)--that good cause exists to except to the deadline in P.U.C. PROC. R. 22.127(d) for a written order addressing the certified issues.

## **II. Commission Authority to Determine if Preemption Exists**

1. *Does the Commission have the power to determine that the Act has preempted any of the provisions of the Public Utility Regulatory Act of 1995, Art. 1446c-0 (Vernon Supp. 1996) (PURA95) applicable to this proceeding?*
2. *If your answer to number 1 is no, how should the Commission proceed with this case?*
3. *your answer to number 1 is no, is the Commission required to continue to enforce the provisions of PURA 95 applicable to this proceeding whose validity may be in doubt?*

In response to the first certified issue, the Commission finds that it possesses statutory authority to ascertain whether federal law has preempted any provision of PURA95. In carrying out its responsibilities under PURA95, the Commission must necessarily interpret and apply the requirements of its controlling statute.<sup>3</sup> In doing so, the Commission must comply with PURA95 §1.404, which states:

This Act shall be construed liberally to promote the effectiveness and efficiency of regulation of public utilities to the extent that such construction preserves the validity of this Act and its provisions. The provisions of this Act shall be construed to apply so as not to conflict with any authority of the United States.

---

<sup>3</sup> Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, as long as the construction is reasonable and does not contradict the plain language of the statute. *Tarrant Appraisal District v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).



As indicated in the last sentence, this provision directs the Commission to harmonize any perceived differences between state and federal law, when possible.<sup>4</sup>

In determining whether any conflict exists between PURA95 and the Act, the Commission must ascertain only whether *express* preemption of the state statute has occurred. Stated another way, it need not determine whether *implicit* preemption has occurred, given the limited preemptive scope of the Act. Section 601(c) of the Act states:

**FEDERAL, STATE, AND LOCAL LAW.--**

(1) *NO IMPLIED EFFECT.*--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments.

(emphasis added). Express preemption occurs “when Congress has ‘unmistakably ... ordained’ that its enactments alone are to regulate a [subject, and] state laws regulating the [subject] must fall.”<sup>5</sup> In other words, express preemption requires an explicit statement in the federal statute that state and local laws are preempted or superseded.<sup>6</sup>

Given the Commission’s conclusion that it is authorized under PURA95 to determine whether the Act preempts state law, the second and third certified issues are moot.

**III. Absence of Express Preemption of PURA95 §3.2532**

4. *If your answer to number 1 is yes, has the Act preempted any of the provisions of PURA95 §3.2532 which are applicable to this proceeding that are the bases for the resale tariffs filed by SWB and GTE/Contel. If so, which ones?*

---

<sup>4</sup> *Accord Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, 888 S.W.2d 921, 926 (Tex. App.--Austin 1994, writ requested) (when interpreting provisions within a statute, rules of statutory construction require harmonizing those provisions, even though differing interpretation for one such provision may be possible when standing alone).

<sup>5</sup> *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

<sup>6</sup> *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983).